

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1499

IN THE
United States Court of Appeals ^{BAS}

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS DEMETROULES and
NMD FILM DISTRIBUTING CO., INC.,
Defendants-Appellants.

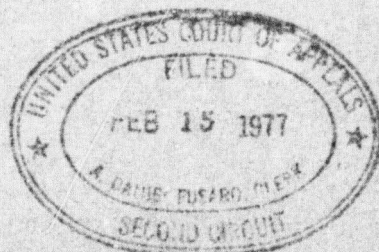
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Plaintiff-Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

THEODORE J. BURNS,
Assistant United States Attorney,
of Counsel.

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6. GERALD HURPS, REPRESENTATIVE
10 CENTER ST., BATAVIA, N.Y. 14003
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On Appeal from the United States District Court
for the Western District of New York

BRIEF FOR APPELLEE

Preliminary Statement

On August 16, 1976 after a jury trial before the Honorable John T. Curtin, Nicholas Demetroules and NMD Film Distributing Co., Inc., were found guilty of using a common carrier to transport an obscene motion picture film, "The Healers", in interstate commerce. Motions for a judgment of acquittal and for a new trial were denied, and each defendant was fined \$2,000. They now appeal their convictions, alleging that the evidence was not sufficient to establish that the film is

obscene, or that the defendants used a common carrier for the interstate shipment of the film.

Statute Involved

The defendants were charged with violating Title 18, United States Code, Section 1462 which provides in pertinent part as follows:

Whoever . . . knowingly uses an express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both . . .

Statement of the Case

On December 5, 1973, FBI Special Agent Lester S. Skinner saw and marked two canisters of film at the Greyhound Bus Terminal in Buffalo, New York. On each canister was a label with the letterhead "NMD Film Distributing Co., Inc". Printed on each label were the words "NMD Films, c/o Clark Service, 108 Gruner Road, Buffalo, New York". Also on each canister were the words "'The Healers' on 2" (Transcript, 44-45; Exhibits 3 and 4). Attached to one canister was a Greyhound bus bill which indicated that the two canisters of film had been shipped by a Greyhound bus on December 4 and 5, 1973 from General Delivery Services in New York City to Clark Distributor at a Buffalo address (Exhibit 1).

Shortly after Agent Skinner marked the canisters, a projectionist employed by the Backstage Theater, a Buffalo movie theater, picked up the film at the bus terminal and took it to the theater where it was shown to the public for several days (Tr, 54-59). On December 11, 1973 while executing a search warrant at the Backstage Theater, FBI Agent Daniel Shaffer recovered the canisters and five reels of film entitled "The Healers", along with the Greyhound bus bill (Tr, 65-68; Exhibits 3 through 9).^{*} The film was shown to the jurors as part of the Government's proof (Tr, 95).

A Greyhound Lines employee testified that his company operates a common carrier in both interstate and intrastate commerce. On the date "The Healers" was shipped from New York City to Buffalo, all Greyhound buses between those two cities traveled via the Lincoln Tunnel through the State of New Jersey and later returned to the State of New York (Tr, 29-31).

The Government and defendants stipulated at trial that Nicholas Demetroules appeared before a Federal Grand Jury in Buffalo on behalf of NMD Film Distributing Co., Inc., shortly before the indictment was returned and produced Government Exhibits 10 through 16. Government Exhibits 10 through 15 are documents relating to the distribution and advertisement of "The Healers". Government Exhibit 16 is NMD's corporate record book.

The defense consisted of two expert witnesses who testified that, in their opinion, the film was not obscene. The defendants did not testify and offered no exhibits.

^{*} No motions were made challenging the search warrant which had been issued by United States Magistrate Edmund F. Maxwell.

ARGUMENT

Point I. The evidence was sufficient to establish that the film is obscene.

"The Healers" is a 72 minute film depicting various forms of sexual conduct under the guise of "treatment" by a doctor and nurse. During the course of the film, the doctor employs a novel form of therapy on his patients referred to in the distributor's Synopsis as a "revolutionary sexual system of healing known as Orgasmic Free Flow" (Exhibit 12, Government's Appendix 15). The doctor finds that his patients' maladies, which include an opera singer's fainting when singing high notes, a man who cannot stop crying, and a belly dancer unable to speak, are attributable to sexual problems. The doctor and his nurse proceed to "heal" the patients by engaging in various forms of sexual activity with them. The film depicts simulated acts of masturbation, cunnilingus, fellatio, and intercourse with genitals often prominently displayed.

The defendants argued at trial that the film is not obscene but is merely a farce in which sex clinics and psychotherapists are held up to ridicule. The jury found otherwise and concluded that "The Healers" was an obscene motion-picture film.

Several months before the shipment of "The Healers" from New York City to the Backstage Theater in Buffalo, a majority of the members of the Supreme Court in June, 1973 finally agreed upon the standards which must be used to identify obscene material that may be regulated without infringing upon the protections of the First Amendment. In *Miller v. California*, 413 U.S. 15 (1973), the Court reviewed the

"somewhat tortured history of the Court's obscenity decisions", *Id.* at 20, and held that

[t]he basic guidelines for the trier of fact must be: (a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (citations omitted); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24.

The Court gave "a few plain examples" of the kind of material which could be regulated:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals. *Id.* at 25.

In subsequent decisions, the Court made plain that the standards enunciated in *Miller*, a case involving a state statute, were also applicable to the federal obscenity statutes. *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 129-30 (1973); *Hamling v. United States*, 418 U.S. 87, 105 (1974).

However, the Court stressed that "we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide" to resolve the "sensitive questions of fact and law" which arise in obscenity cases. *Miller v. California*, 413 U.S. at 26.

At trial the defendants requested the Court to instruct the jurors in accordance with *Roth v. United States*, 354 U.S. 476

(1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), that they could not find the film obscene unless they concluded that it was "utterly lacking in social value or importance". Judge Curtin properly refused the requested instruction and, instead, used the obscenity definition in *Miller*. While the defendants do not now argue that the *Miller* charge was improper, they ask this Court to interpret the *Miller* standard in the light of the *Roth* and *Memoirs* cases and other pre-*Miller* decisions of this Court.

It is apparent that *Roth* and *Memoirs* provide little guidance today for the Federal Courts in defining what constitutes obscenity. Writing for the majority in *Miller*, Chief Justice Burger found that the Court "veered sharply away from the *Roth* concept" in *Memoirs* when the Court required the prosecution to establish that the material was "utterly without redeeming social value" 413 U.S. at 21. The Court's definition of obscenity in *Memoirs* was supported by only three members. Finally, in *Miller*, the Chief Justice noted that "the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation" *Id.* at 23.

As a result, the defendants' reliance on the *Roth-Memoirs* cases and any subsequent decisions by this Court which were based upon those cases is misplaced.

Likewise, their argument notwithstanding, the defendants can find little support for their position in *Jenkins v. Georgia*, 418 U.S. 153 (1974), where the Supreme Court held that the movie "Carnal Knowledge" was not obscene. In *Jenkins* the Court concluded that "[n]othing in the movie falls in either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently

similar to such material to justify similar treatment" 418 U.S. at 161 (1974).

It should be clear from the viewing of the film which is the subject of this case that the scenes in "The Healers" go far beyond those in "Carnal Knowledge" in their portrayal of sexual conduct. In "The Healers" there are "representations . . . of ultimate sexual acts, normal or perverted, actual or simulated" and also "representations . . . of masturbation . . . and lewd exhibition of the genitals". The film contains substantially more than merely a "depiction of a woman with a bare midriff" which the Supreme Court found insufficient to justify the jury finding that "Carnal Knowledge" was obscene. *Id.* at 161. Furthermore, unlike "Carnal Knowledge", the camera in "The Healers" focuses continuously on the bodies of the actors and exhibits their genitals in a graphic display of ultimate sex acts in a manner which the jury was justified in determining was patently offensive.

The defendants further argue that the community standards to be applied to the film are state standards rather than the standards in the 17 counties in the Western District of New York which Judge Curtin instructed the jurors to apply. This argument is foreclosed by the Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87, 105-106 (1974), and this Court's holding in *United States v. One Reel of 35MM Color Motion Picture Film*, 491 F.2d 956, 958 (2nd Cir. 1974), that the community standards to be applied may properly be those within the judicial district where the case is tried.

Finally, the defendants argue that they should have been allowed to show the jury that no one else in New York State has been prosecuted for distribution or exhibition of "The Healers". However, there is no indication in the Record that

the defendants sought to present any such evidence, albeit irrelevant.* In any event, this Court has held that "[m]ere availability of similar material by itself means nothing more than that other persons are engaged in similar activities". *United States v. Manarite*, 448 F.2d 583, 593 (2nd Cir. 1971). See also *United States v. One Reel of 35 MM Color Motion Picture Film*, 491 F.2d 956, 959 (2nd Cir. 1974) and *Hamling v. United States*, 418 U.S. 87, 125-126 (1974).

Point II. The evidence was sufficient to establish that the defendants used a common carrier for the interstate shipment of the film.

There was substantial evidence before the jury to show that NMD used a common carrier to ship "The Healers" from New York City to Buffalo on December 4-5, 1973. For instance, the licensing agreement between the producer of the film and NMD granted NMD the exclusive right to distribute the film in the United States (Exhibit 10, Gov't. App. 1-11). In addition, the shipping labels on the canisters indicate that NMD shipped the film and intended to receive it through its Buffalo agent, Clark Service, Inc. (Exhibits 3 and 4). Furthermore, Clark Service billed NMD for shipment of "The Healers" from New York City to the Backstage Theater in Buffalo on December 5, 1973 (Exhibit 15, Gov't. App. 22-24). Finally, the corporation's name is prominently displayed as the distributor on brochures and flyers advertising the film (Exhibits 11-13, Gov't. App. 12-21).

* At pages 12-13 of their Brief, the defendants state that their film "apparently has been shown elsewhere in the State of New York without any difficulties of any kind, . . . has never been prosecuted by any of the local authorities, . . . and has been shown in colleges and other places of education without interference by any local official or by any local dean of any kind". Aside from being irrelevant, this argument has no support in the Record. The defendants never attempted to present any such evidence on this point, nor did they make an offer of proof to preserve their objection.

In addition to the evidence implicating the corporation in the distribution of the film, there was also substantial evidence that the individual defendant, Nicholas Demetroules, took an active role in both the distribution and shipment of the film. Demetroules was the principal shareholder of the corporation, owning 94% of the stock in the corporation at the time of the offense. He was the president and treasurer of NMD, and one of only two directors (Exhibit 16, Gov't. App. 33-34). He signed the licensing agreement for the corporation which permitted him to distribute the film to movie theaters in New York State and elsewhere in the United States (Exhibit 10, Gov't. App. 11). Moreover, the promotional literature proclaimed that "Nicholas Demetroules presents Eduardo Cernano's 'The Healers' " (Exhibits 11-14, Gov't. App. 12-21). On the basis of this evidence, the jury could properly find that Nicholas Demetroules, as well as NMD, used the Greyhound bus lines to transport an obscene motion picture film. See *Hamling v. United States*, 418 U.S. 87, 95-96 and 124 (1974).

On the issue of criminal liability of a corporation and its officers, Judge Curtin instructed the jury as follows:

One of the defendants in this case is a corporation. A corporation is a legal entity, a person, and a corporation may be found guilty of a criminal offense. A corporation, of course, may only act through the actual persons who are known as its agents. In general, any agent or representative of a corporation who has adequate authority may bind the corporation by his acts, declarations and omissions. In order to find a corporation defendant guilty, you must find that all of the essential elements of the offense as set out in these instructions are present as to the corporation in the form of acts or omissions of agents of the corporation within their authority. The scope of authority of these agents is a

question of fact for you to decide just as the other fact questions in the case.

Although a corporation may be held liable on the basis of an act or omission of any agent possessing adequate authority, a higher standard of proof is required for individual defendants. In general, an individual defendant may be held criminally liable on the basis of an act or omission of another person only if it appears beyond a reasonable doubt that he willfully ordered or directed or willfully authorized or consented to the acts or omission in question (Appellant's Appendix A28-A30).

The Court also gave the standard charge that an individual who willfully participates in the commission of a crime may be found guilty of an offense. Title 18, United States Code, Section 2(b).

Although the defendants now argue that the Government failed to prove that either defendant used a common carrier to transport the film, the defendants did not object to the Court's charge as to potential criminal liability of a corporation and its officers, nor did they submit any proposed instructions on the quantum of proof necessary to convict a corporation or its officers.

The Court's instructions on this point were entirely proper. *United States v. Wise*, 370 U.S. 405, 416 (1962); and *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1372 (D.C. Cir. 1975). See also *United States v. Park*, 421 U.S. 658 (1975), and Devitt and Blackmar, *Federal Jury Practice and Instructions*, Sections 11.13 and 11.14.

The defendants argue that, in order to establish a violation of Section 1462, the Government must prove that they actually shipped the film from New York City to Buffalo. Section 1462 imposes no such burden. The Government need

only prove that the defendants "used" a common carrier for the interstate transportation of the film. Even if one accepts the defendants' suggestion that the Buffalo theater ordered the shipment of the film via Greyhound bus from New York City, this hypothesis cannot insulate the defendants from criminal liability since the evidence clearly establishes that it was the defendants who used and intended to use the common carrier for the distribution of its film. Section 1462 penalizes not only the shipper of the article, but also imposes criminal sanctions on those who make use of the common carrier to transport obscene material in interstate commerce. Since the evidence shows that the defendants were the sole distributor of the film and willingly permitted transportation of their film by the common carrier in order to facilitate its commercial distribution, the jury could properly find that the defendants used the common carrier within the meaning and intent of Section 1462.

From the evidence presented at trial, which must be viewed on appeal in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942); *Hamling v. United States*, 418 U.S. 87, 124 (1974), the guilty verdicts were proper.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgments of conviction should be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
502 United States Courthouse,
Buffalo, New York 14202.

Theodore J. Burns,
Assistant United States Attorney,
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

RE: USA vs Nicholas Demetroules
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No. 76-1499

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Leslie R. Johnson

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11th day of February, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19.....